Supreme Court of the United States

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960.

No.

CORY CORPORATION AND MITCHELL MANUFACTURING COMPANY,

Petitioners,

vs.

ERNEST J. SAUBER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. 1a, *infra*)[1] filed November 21, 1960, after remandment by this Court (363 U.S. 709) and the separate opinion of Judge Duffy dissenting from denial of rehearing (App. 13a) filed January 11, 1961, are reported at 284 F.2d 767.

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[1] The designation "(App. . . . .)" refers to pages of the Appendix to this petition, which pages are numbered consecutively 1a to 23a, inclusive.

JURISDICTION.

The judgment of the Court of Appeals (App. 15a) was entered on November 21, 1960. Petition for rehearing *en banc* was duly filed December 6, 1960, and denied January 6, 1961. (App. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

This is a civil action arising under acts of Congress providing for the internal revenue, of which the United States District Court has original jurisdiction under 28 U.S.C. §1340.

QUESTIONS PRESENTED.

1. May a court of appeals, under a mandate of this Court directing review of a finding pertinent to the construction of administrative rulings held valid by this Court, (a) disregard the finding without reviewing it and (b) adopt a construction of the rulings that is in direct conflict with the basis on which this Court has held the rulings valid?

2. Is the agreement of the federal government to abide by the decision of a contested tax case subject to summary invalidation by a federal court at any stage of litigation, in the absence of any suggestion of unfairness, illegality, impropriety or mistake?

STATUTES AND REVENUE RULINGS.

Section 3405 of the Internal Revenue Code of 1939, Section 4111 and Section 6416(a) (1) of the Internal Revenue Code of 1954, S.T. 934, 1948-2 C.B. 180 and Rev. Rul. 54-462, 1954-2 C.B. 410, are set forth in the Appendix at pp. 18a-23a, *infra*.

STATEMENT.

On February 11, 1957, taxpayers brought actions in the District Court against respondent, former District Director of Internal Revenue, seeking refund of manufacturers' excise taxes collected on the sales of two air conditioning units sold in 1954 and 1955. (R. 1-10.)[2] On June 14, 1957, the parties stipulated that the collection of excise taxes assessed on the sales of air conditioning units similar to the two units would be deferred until final adjudication of these actions and that the decision here would determine the taxability of the other sales. (R. 13-14.) All the sales were made at a time when revenue rulings issued by the Commissioner limited the application of the tax to air conditioning units having "a total motor horsepower of less than 1 horsepower." (R. 40-41.)[3] The District Court entered judgment for taxpayers (R. 154) holding that the units were exempt as having a "total motor horsepower" of 1 horsepower or more. (R. 139-154.) The Court of Appeals reversed, holding that the revenue rulings were void. (R. 170-178.)

This Court reversed and remanded. (363 U.S. 709.) It held that the revenue rulings were not void, since horsepower "may have had some relation to size in the then

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[2] The designation "(R. . . . .)" refers to pages of the printed transcript of the original record filed with this Court on the prior writ of certiorari, No. 436, October Term, 1959. The original record itself has been recertified by the Court of Appeals and is refiled with the present petition. The certified record of subsequent proceedings in the Court of Appeals following remandment is also filed herewith and is reproduced in the Appendix to this petition (App. 1a-16a).

[3] S.T. 934, 1948-2 C.B. 180, superseded by Rev. Rul. 54-462, 1954-2 C.B. 410 (App. 22a-23a), defining "the type of self-contained air conditioning unit subject to tax" under § 3405 (c) of the 1939 Code (App. 18a-19a), reenacted as § 4111 of the 1954 Code (App. 19a-20a).

stage of engineering development" and might thus have been a relevant measure of taxability under the statute. (363 U.S. 711.) It directed the Court of Appeals to review a finding of the District Court as to the meaning of horsepower "among engineers." (363 U.S. 712.) This Court also noted that taxpayers' air conditioners had been found to have both an actual and "rated" horsepower of 1 horsepower, "rated" horsepower being defined as that "assigned on the basis of standards established by trade associations." (363 U.S. 710.)

Upon remandment, the Court of Appeals again reversed the District Court (App. 1a). It rejected without review the "engineers' definition" of horsepower and also rejected this Court's definition of "rated" horsepower. (App. 2a.) It redefined "rated" horsepower as the unstandardized nominal horsepower appearing on "rating tags" and construed the rulings as measuring taxability by these nominal designations, without regard to their accuracy under any engineering or industry standard. (App. 2a, 7a.) The Court of Appeals also held, of its own motion[4] and without request by any party, that the stipulation as to the effect of these actions on other assessments was contrary to the public interest and void. (App. 7a-12a.) A petition for rehearing was denied over the dissent of Judge Duffy, who stated that the stipulation was valid and that the majority's decision was in disregard of the direction of this Court. (App. 13a-14a.)

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[4] The Court of Appeals refused to accept memoranda or to hear oral argument on remandment. (App. 17a).

REASONS FOR GRANTING THE WRIT.

The writ should be granted, we submit, because the decision below on remandment does not comply with the mandate of this Court nor adhere to the opinion of this Court; because invalidation of the stipulation is in conflict with the applicable decisions of this Court and with the decision of another court of appeals on the same matter, and involves an important question of federal law; and because the disposition of this case on remandment so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Supreme Court Rule 19.1(b).

1.

The issues before this Court on prior review were "the construction and validity of the revenue rulings." (363 U.S. 711.) In holding the rulings valid, this Court necessarily construed them as embodying a standard relevant to the statutory command. It held that horsepower "may have had some relation to *size* in the then state of *engineering* development and *size* might well have been relevant to what was then a 'self-contained air-conditioning unit.'" (363 U.S. 711.) It remanded this cause with an express direction to the court below to review a finding as to the meaning of horsepower "among *engineers*". (363 U.S. 712.)

The Court of Appeals, however, has neither reviewed the finding nor inquired into the meaning of horsepower as an engineering concept. Instead, it has disavowed "the engineers' definition" of horsepower and has re-construed the rulings as incorporating nominal ratings that have no relation to size or engineering and no relevance to the statutory definition. (App. 2a-7a.) It has thus disregarded the basis on which this Court sustained the rulings. The court below, in short, has not only failed

to comply with the mandate but has rendered a decision that conflicts with the decision of this Court. Cf. *United States* v. *Parke, Davis & Co.*, ... U.S. ....., 5 L.ed. 2d 457 (January 23, 1961).

This view is shared by a member of the Court of Appeals. Judge Duffy, dissenting from denial of rehearing, stated:

> The Supreme Court directed this Court to review the District Court's findings as to what horsepower meant "among engineers." Our Court has now disregarded engineering concepts and selects criteria derived from plates on compressor housings and tags. (App. 14a).

The criteria selected by the Court of Appeals are nothing more than the arbitrary and unstandardized nominal ratings assigned by individual motor manufacturers to particular motors used in air conditioners.[5] These designations do not conform to any engineering standard nor to the "standards established by trade associations" which this Court has defined as "rated" horsepower. (363 U.S. 710.) Although the court below now calls nominal horse-

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[5] The selection of nominal ratings is made by the manufacturers of the motors, not by the taxpayers. (R. 49-50). Motor manufacturers are free to assign to any motor any nominal rating that they choose, irrespective of the standards established by their trade association. (R. 149). It is stipulated that the factors affecting the assignment of nominal ratings include "motor manufacturers' pricing policies, competition between manufacturers, and varying popular concepts concerning size, power and current consumption." (R. 51). It is also stipulated that motor manufacturers have assigned different nominal ratings to the same motor (R. 50) and have nominally rated at "1 horsepower" motors whose actual size and rated horsepower is less than that of taxpayers' nominal "¾ horsepower" motors. (R. 50.)

power "rated horsepower" (App. 2a), this change of nomenclature does not bring its decision within the mandate. As stated by Judge Duffy:

> In my view, the decision of this Court is wrong in equating rated horsepower with nominal horsepower.
> • • •
>
> Nominal horsepower is not the same as rated horsepower. Nominal horsepower is assigned solely in the uncontrolled discretion of the various motor manufacturers. Actual horsepower and rated horsepower are standardized, measurable and easily ascertainable. Nominal horsepower is arbitrary and unstandardized. (App. 14a)

The Court of Appeals thus holds, under the revenue rulings sustained by this Court, that when a motor manfacturer departs from both engineering and industry standards and mislabels the horsepower of a motor, it is the label and not the fact that controls taxation. Such a holding cannot be reconciled with this Court's opinion.

The decision below was reached by culling from lengthy correspondence a single reference in a proposed (and rejected) draft to "rated capacity"—a term not used in the rulings nor repeated in the correspondence—and reasoning therefrom that the Commissioner intended that taxation be governed by "rating tags" which could be seen by retail purchasers.[6] (App. 7a.) Nothing in the correspondence, however, indicates that the word "rated" was intended to refer to nominal horsepower. On the contrary, the context of the letters indicates a concern for what is "feasible from an *engineering* standpoint." (App. 5a.) Both the Internal Revenue Service before the trial (R. 37) and government counsel at the trial (R. 105) considered

[6] The tax is imposed on the manufacturer, not on the retail purchaser (§3405(c) 1939 Code, App. 18a.)

rated horsepower under trade association standards to be the controlling factor.

In any case, whatever the Commissioner may have thought about horsepower, this Court clearly did not sustain a ruling that delegated the federal taxing power to "the uncontrolled discretion of various motor manufacturers." (App. 14a; see *Schechter Poultry Corporation v. United States*, 295 U.S. 495.)

In reversing the District Court, the Court of Appeals, we submit, has reversed this Court as well.

2.

On June 14, 1957, after these actions had been pending for several months, the parties stipulated that the taxability of the two units in suit would determine the taxability of similar units on which assessments were being made and agreed that collection of these assessments would be deferred until final adjudication of this case. (R. 13-15.)

The identical issue of taxability is presented by the civil actions and the contested assessments. The Stipulation of Facts limits the effect of the adjudication to units that are similar to the two units in all the engineering and physical characteristics pertinent to taxability under the revenue rulings. (R. 39-51)[1] Since the rulings have been held valid and since all the units were sold while the same rulings were in effect, the rulings determine the taxability of all units. Thus the same issue of law and fact is common to all the units covered by the stipulation.

[1] The stipulation as to similarity is a stipulation of fact, binding on the parties and on the courts. H. Hackfeld & Co. v. United States, 197 U.S. 442, 446.

Nevertheless, the Court of Appeals on remandment struck down the stipulation, without motion or hearing, as a "stipulation of law" and as contrary to the "public interest." (App. 7a-12a.) As stated by Judge Duffy:

> "This Court, on its motion, and without any request by either party, has invalidated the basic stipulation upon which this litigation has proceeded in three courts for more than three years. The Government has made no effort to repudiate the agreement which it made.
>
> "On June 3, 1957, the Government had asked for a continuance to which plaintiffs objected. After eleven days of negotiation with the Internal Revenue Service and the Department of Justice, the stipulation was entered into. No one has suggested the stipulation was unfair, inadequate or induced by misrepresentation or mistake. The Government does not claim that it has been over-reached. It seems to me that the stipulation is in the public interest. This was not a stipulation of law as indicated in our opinion. It related only to 'air conditioning units similar to those described in the above civil actions.'
>
> "Rather than try the same issue of fact and law in numerous proceedings, the parties agreed to try the issue once and for all in the present case. There can be no public interest that demands repeated trials of the same issue. Stipulations designed to avoid repeated trials of the same issue should be held valid and binding." (App. 13a-14a)

This action of the Court below, we submit, should be reviewed because it is in conflict with the applicable decisions of this Court and with that of another court of

appeals and because it announces a novel theory of federal law that may seriously affect the agreements of the government. Moreover, it is a departure from the usual course of judicial proceedings not warranted by the mandate and, if intended as a device to prevent a windfall, is unauthorized and inappropriate (see p. 12, *infra*).

(a)

The holding below that an agreement to abide by the adjudication in another case is a "stipulation of law," voidable at any time by any court, is in conflict with decisions of this Court. In *Prout* v. *Starr*, 188 U.S. 537, and *Knott* v. *St. Louis S.W.R. Co.*, 230 U.S. 509, this Court enforced such agreements, held them competent and binding, and refused to readjudicate the issues previously adjudicated in the test cases.

The decision below is even more directly in conflict with a decision of the Court of Appeals for the Third Circuit. In *United States* v. *Davison*, 9 F. 2d 1022, cert. den. 271 U.S. 670, the court affirmed a decision of the District Court (1 F.2d 465) which enforced a stipulation that the adjudication of one federal tax case should control the decision of other tax cases involving the same factual situation. The District Court stated (1 F.2d at 470):

> "It was greatly to the interest of both parties to that action that a score of cases, involving the same questions of fact and law, should be disposed of by the trial and final adjudication of a single case. This both sides agreed to.
>
> "I shall not pass on the question as to whether the government is absolutely precluded by the agreement made. This ought not to be necessary. It is a question of good faith. No one, not even a sovereign nation, should be permitted to gamble on the result of a judgment, and then repudiate the result when the judgment is adverse."

The court below, however, has made a contrary decision, even though the government has not asked to be relieved of its stipulation.

(b)

The government has made no agreements as to other "tax refund claims" or "disbursements from the federal Treasury."[8] (App. 11a) It has merely agreed to refrain from collecting contested assessments until their legality has been adjudicated in the present case. In return, the government received taxpayers' agreement to abide by the same adjudication, to furnish continuous evidence of their financial responsibility, and to consent to a continuance. (R. 13-15) The fairness and propriety of this agreement have never been challenged.[9] Yet the Court of Appeals has set aside the agreement as contrary to "the public interest in protecting the federal revenue." (App. 11a.)

As noted by Judge Duffy, the public interest is not served by repeated trials of the same issue. Even less, we submit, is the public interest served by a decision that stipulations of the federal government may be summarily

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[8] No tax refund claims are pending and, if the stipulation is honored, it is unlikely that any such claims will be filed. The government will not collect the tax if it is not due, while taxpayers will gain nothing by seeking refunds if the units are taxable.

[9] Nor is there any basis for speaking of the civil actions as "contrived." (App. 11a). They were at issue long before the stipulation was made. (R. 1-13.) The sales of the two units were not "contrived"; they were bona fide sales, made before any tax controversy arose. We do not understand the significance attached to the fact that the purchasers of these units who executed the requisite statutory consents had rendered professional services to taxpayers. (App. 9a.) Congress has expressly authorized the filing of refund claims with the written consent of "the ultimate purchaser of the

struck down at any stage of litigation. Nor does "protection of the federal revenue" (App. 11a) require the collection of illegal assessments. The decision below, if permitted to stand, may seriously impair the ability of the government to make reasonable agreements on which taxpayers will be able to rely.

(c)

The mandate of this Court, we submit, did not authorize the court below to enter a declaratory judgment, without evidence or hearing, on a matter not in issue. The validity of the stipulation has never been in issue. The assessments on the similar units have not been collected; if the stipulation is honored, they will not be collected unless and until it is determined in this case that they are legal. The Commissioner has not claimed the right to collect illegal assessments; until he does, the validity of the stipulation will not be ripe for judicial determination.

It may be (although the Court of Appeals does not say so) that the invalidation of the stipulation was an attempt to respond to the permission granted by this Court to enter appropriate orders to prevent a windfall. (363 U.S. 709, at 712.) If so, the attempt miscarried.

The possibility of a windfall depends on whether or not taxpayers collected taxes from their customers that are not payable to the government; this is an issue of fact

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[9] (Continued)
article" (I.R.C. 1954 §6416(a)(1), App. 20a); we do not know how consents could be obtained from persons unwilling to execute them. That taxpayers have fully complied with the statutory prerequisites for bringing these actions has never been questioned.

that has never been tried.[10] Certainly, this Court did not authorize the court below to decide this factual issue without evidence or to encourage the government to obtain a windfall through collection of illegal assessments.

What this Court did authorize, we believe, was a further remandment to the District Court to take evidence on the question of windfall and to provide that any customer from whom a tax was erroneously collected may recover the amount to which he is found to be entitled.[11] Such a procedure, we submit, would insure that no one would be deprived of his day in court, no one would receive or obtain a windfall, and full justice would be done to the government, to taxpayers, and to taxpayers' customers.

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[10] Taxpayers anticipated from this Court's decision that such a trial would be ordered, and they have therefore made a complete survey of their records of sales of air conditioners similar to the two units. If there is any concern that taxpayers would be unjustly enriched by a judgment in their favor, the full documentation is available, and any trial of this question will be greatly accelerated by the survey already made.

[11] The apprehension expressed by Mr. Justice Clark in dissent, that the likelihood of recovery by taxpayers' customers "would be highly remote" (363 U.S., at 718) should, we believe, be dispelled by the taxpayers' survey (fn. 10, supra) which includes the name and address of every customer of every unit appearing in the invoices in taxpayers' files.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN A. ROTHSCHILD,
SIDNEY M. PERLSTADT,
77 West Washington Street
Chicago 2, Illinois,

STANFORD CLINTON,
111 West Monroe Street
Chicago, Illinois
Attorneys for Petitioners

APPENDIX.

1. OPINIONS BELOW.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12479 SEPTEMBER TERM, 1960—SEPTEMBER SESSION, 1960

CORY CORPORATION and MITCHELL MANUFACTURING COMPANY, Delaware corporations, *Plaintiffs-Appellees*, v. ERNEST J. SAUBER, *Defendant-Appellant*. } On Appeal from the United States District Court for the Northern District of Illinois.

November 21, 1960.

Before HASTINGS, *Chief Judge*, and DUFFY and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Following our reversal (266 F.2d 58, 267 F.2d 802) of a judgment of the district court in favor of Cory Corporation, a Delaware corporation, in consolidated suits for refund of excise taxes collected on sales of air conditioners in 1954 and 1955, the United States Supreme Court, 363 U.S. 709, reversed this court, and held, at 711, that the horsepower test is a permissible one and that the revenue rulings which were in force from 1948 to 1959 were not void. The Supreme Court mentioned, at 712, that the district court had found that "Among engineers, the horsepower of a motor does not mean its nominal horsepower rating but means the

actual horsepower which the motor will deliver continuously under its full normal load". It pointed out that we did not reach that question nor review that finding in view of our conclusion that the horsepower test was not valid. The case was remanded to this court for consideration of that and any other questions which may remain.

1. Accordingly, on this record, we accept the horsepower test as valid. The question then arises whether the Commissioner, in applying that test, adopted the engineers' definition of the horsepower of a motor as the actual horsepower which the motor will deliver continuously under its full normal load, or its nominal horsepower rating. We shall refer to these measurements as the "actual horsepower" and "rated horsepower" tests respectively.

Under date of September 26, 1947, the Commissioner, having solicited the views of the air conditioning industry, received a letter from the Air Conditioning and Refrigerating Machinery Association, reading, in part, as follows:

> "The term 'self-contained' is one which has had a broad and somewhat loose connotation as a trade term in the industry. It has been applied to the small, portable air conditioner, and it has been used to describe a thousand-horsepower centrifugal refrigeration unit such as is used for air conditioning purposes. It seems probable that, in writing Section 3405 (c) of the Internal Revenue Code, Congress used the term 'self-contained air conditioner' in attempting to describe the portable, plug-in electric appliance known as a room air conditioner, similar in general concept to the commonly-used household refrigerator.
>
> "For purposes of taxation, it is desirable that there be available a definition, as exact as possible, of the article subject to tax. The only truly 'self-contained air conditioner' being marketed today, so far as we know, is the room air conditioner (room cooler). • • •"

On December 12, 1947, Deputy Commissioner Bliss wrote the York Corporation, a manufacturer of air conditioners:

"• • •

"The Bureau has recently had occasion to re-examine its position with respect to the scope of the tax on 'self-contained air-conditioning units' imposed under section 3405 (c) of the Internal Revenue Code with a view to determining whether it would be possible to formulate a legally sound definition of the term which could be simply applied and which would have uniform application throughout the air-conditioning industry.

"From a consideration of section 3405(c), it appears that the law could, with justification and without regard to other factors, be interpreted to include within its scope any air-conditioning assembly which is so constructed that all of its mechanical components are housed in a single cabinet. To give effect to such an interpretation of the law, the term 'self-contained air-conditioning unit' could be defined as follows:

> 'A self-contained air-conditioning unit within the meaning of section 3405 (c) of the Internal Revenue Code is an encased assembly of a condensing unit with other components which serves as a means for ventilation and for cooling, dehumidifying, cleaning, and circulating air.'

"The foregoing definition does not take into consideration such additional factors as to whether the unit may be installed in the room to be conditioned and may be used without ducts for the distribution or return of the conditioned air. One of the principal difficulties in the way of formulating a definition which would give effect to these additional factors and which, at the same time, would be susceptible of fair and easily understood application in the industry is the variety of conditioning units being manufactured and the varied claims made by manufacturers with respect to the functioning and use of the units produced by them. In general, however, it is believed from the information available that these additional factors

may be fairly reduced to a test expressed in terms of the *rated* horsepower capacity of the compressor motor used in the air-conditioning unit. If these additional factors are to be taken into consideration in fixing the scope of the law, the term 'self-contained air-conditioning unit' could be defined as follows:

> 'A self-contained air-conditioning unit within the meaning of section 3405 (c) of the Internal Revenue Code is an encased assembly of a condensing unit with other components which (1) has a compressor motor, the *rated* capacity of which is 5 h.p. or less, and (2) serves as a means of ventilation and for cooling, dehumidifying, cleaning, and circulating air.'

"The Bureau desires to extend to the industry an opportunity to be heard and to express its views in the matter. Accordingly, the Bureau would appreciate receiving a statement of your views at the earliest practicable date. Similar letters are being addressed to each manufacturer of air-conditioning units of which there is a record in this office."

(Italics supplied.)

Replying to that letter, the York Corporation on January 15, 1948, wrote to the Commissioner a detailed letter, offering a definition of a self-contained air conditioner, within the meaning of § 3405 (c):

"• • •

> "'A self-contained air conditioner, within the meaning of section 3405 (c) of the Internal Revenue Code, is a factory made encased assembly primarily designed for free delivery of air, and for installation in a window or in front of a window; containing means for moving outside air through its condenser; and having means for ventilation and for cooling, dehumidifying, cleaning, and circulating the air of a room; and having a total motor horsepower of less than one horsepower or a total cooling capacity of less than 10,

000 Btu's per hour at standard American Society of Refrigerating Engineers test conditions as set forth in ASRE Circular No. 16 dated June 1940.'

"We believe the suggested definition is sufficiently broad in its scope to include without exception all self-contained air conditioning units which are now being manufactured. The definition gives recognition to the fact that some units function by means other than electric motor driven compressors. The horsepower limitation was inserted for purpose of facilitating administration, inasmuch as it is not feasible from an engineering standpoint to employ a motor of greater horsepower capacity in a self-contained air conditioning unit.

"• • • we attended a special meeting called of industry members at which time the problem was discussed fully.

"The definition that we have suggested was unanimously adopted by all who attended, and was formulated with the realization of the administrative problems involved as well as the fundamental question of what constitutes a self-contained air conditioning unit as the term is commonly understood among those who produce such equipment."

On April 21, 1948, Acting Commissioner Sherwood wrote to Air Conditioning and Refrigerating Machinery Association, referring "to the various conferences held with you and other representatives of the air-conditioning industry," and stated that "the following definition has been formulated to indicate the position of the Bureau as to the type of units properly to be included within the scope of" § 3405 (c):

"A self-contained air-conditioning unit, • • • (3) has a total motor horsepower of less than one horsepower or a total cooling capacity of less than 10,000 BTU's per hour at standard American Society of Refrigerating Engineers test conditions as set forth in ASRE Circular No. 16 dated June, 1940."

We are convinced that the foregoing facts establish that the Commissioner had been given the assurance of the industry that a *rated* motor horsepower test of less-than-one-horsepower, to use the words of York, "is sufficiently broad in its scope to include without exception all self-contained air conditioning units which are now being manufactured", since "it is not feasible from an engineering standpoint to employ a motor of greater horsepower capacity in a self-contained air conditioning unit."

It can hardly be presumed that the industry intended to mislead the Commissioner, knowing, as it must have, that actual horsepower of a motor might vary from less to more than one horsepower depending on the particular motor and the test employed. The industry must, therefore, have made its recommendations on the rated horsepower which motor manufacturers were assigning to their motors at that time. It is clear, and the court below found, that it is the practice of the industry for air conditioner manufacturers to list the horsepower of a household-type unit as the rated horsepower assigned by the motor manufacturer[1] and not the actual horsepower.

That the Commissioner was thinkng in terms of rated horsepower is borne out by the fact that in his letter of December 12, 1947 to York Corporation he suggested that units with a "rated capacity" of five horsepower or less be subject to the tax. While the rulings as finally promulgated omitted the reference to *rated capacity*, failure to set forth any other test or procedure for determining horsepower, although a test was carefully designated for determining the cooling capacity of absorption types, suggests the Commissioner intended to follow the recognized practice of the industry and apply the rated capacity test. The rated horsepower test gives the necessary uniformity which the industry and the Commissioner were seeking in order to facilitate and simplify administration of § 3405 (c).

[1] Such rating is affixed to plates fastened to the exterior of the compressor housings.

It is obvious that the Commissioner accepted the nominal ratings used in the industry. He did not even solicit reports on tests which would reveal actual horsepower under existing engineering standards for each unit on the market. Neither was such information tendered to him by the manufacturers in the air-conditioning industry. This corroborates our conclusion that taxability was determined by horsepower ratings adopted by the manufacturers which appeared on the plates affixed to the units sold and was not determined by actual horsepower output.

Moreover, prior to issuing the 1954 ruling which revised the 1948 ruling in respects not material here, the Commissioner held a conference with representatives of the Air Conditioning and Refrigeration Institute. We have examined the stipulated facts as to said conference and subsequent correspondence and do not find that they in any way show a change in the interpretation of the 1948 ruling as applied to the horsepower of self-contained air conditioners.

Our interpretation of the 1948 and 1954 rulings makes for a practical enforcement of § 3405 (c), which ultimately imposes a tax upon the retail purchaser of an air conditioner. Whether or not such an individual is to bear a tax upon his purchase can readily be established by an inspection of the manufacturer's horsepower *rating* tag affixed thereto. If the converse were true and only a test for *actual* horsepower of the motor *in operation* would reveal whether the conditioner is taxable, a purchaser would be practically unable to make such a determination.

In view of the foregoing, we conclude that in his 1948 and 1954 rulings the Commissioner adopted the rated horsepower test and made a rating of less-than-one-horsepower the line of demarcation between taxability and nontaxability. The reference of the Commissioner to the rated horsepower capacity of the compressor motors used in the air conditioning units indicate that his rulings were meant to conform with the prevalent views of the industry. While it is apparent that there was not complete unanimity in

the industry as to these views,[2] there is sufficient basis for interpreting the rulings of the Commissioner as a formal adoption thereof.

Because of what we have said, we hold that finding 53 of the district court, in several inseparable parts, is clearly erroneous. It reads:

> "The evidence fails to show that it was the intention of the Commissioner of Internal Revenue or of his subordinates, in drafting the 1948 ruling and the 1954 ruling, to refer to nominal horsepower ratings as prescribed by NEMA standards or as selected by individual motor manufacturers, nor does it appear that the Commissioner or his subordinates intended to make taxability turn upon such nominal ratings rather than upon actual horsepower output. • • •"

2. We now deal with matters which may properly be included in "any other questions which may remain", *ante*, 284 F.2d 768.

The amount directly involved in the case at bar is $29.93, being the total of two excise tax payments collected on the sales of two air conditioning units sold in 1954 and 1955, as referred to in findings 3 and 4 of the district court. The taxes were based on § 3405 (c) of the Internal Revenue Code of 1939, 26 U.S.C.A. (1952 ed.) § 3405 (c), which imposed a 10% tax on "[s]elf-contained air-conditioning units." To qualify for bringing their suit for refund of taxes, plaintiffs alleged in their complaints, and it was stipulated in the district court, that Keith

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[2] In the field of manufacturers of electric motors and generators, there is a private trade association known as National Electrical Manufacturers Association, some of whom make motors for plaintiff's air conditioners. This association's publications state that the existence of an NEMA standard "does not in any respect preclude any member or nonmember from manufacturing or selling products not conforming to the standard".

The district court found that within the NEMA range for 1 horsepower rating, as interpreted by motor manufacturers who are members of NEMA, the proper horsepower rating of plaintiff's motors under NEMA standards would be 1 horsepower.

The district court also found that motor manufacturers are not required to comply with NEMA standards and are free to depart from them.

McKy and Thomas Carlin would have testified, if called as witnesses, that they each bought such a unit and executed a written consent to a claim for refund, copy of which was attached to the complaint. It appears from the separate opinion of Mr. Justice Clark herein, in which the Chief Justice and Mr. Justice Black joined, that these purchasers were a lawyer and an accountant of plaintiffs.

The district court found:

"5. Defendant's successor, the present District Director of Internal Revenue, Chicago, has assessed and proposes to assess against Cory, Mitchell and Pearce, substantially more than one million dollars in federal excise taxes upon the sales of air conditioning units similar to those described in paragraphs 3 and 4.

"6. The air conditioning units described in paragraphs 3 and 4, being those described in the complaints, and the similar units described in paragraph 5 are sometimes hereinafter collectively referred to as plaintiff's air conditioners.

"7. It has been heretofore stipulated by the parties and found by this court that the present consolidated civil action is a prototype or test case to determine whether plaintiff's air conditioners are subject to excise tax."

That court also concluded as a matter of law, *inter alia*:

"3. By reason of stipulations and orders heretofore entered herein, this civil action brings before this court for determination the issue of whether air conditioning units similar to those described in the complaint, on which federal excise tax assessments have been made and are proposed to be made by defendant and his successor as District Director of Internal Revenue, Chicago, are subject to federal excise tax."

In the majority opinion, the Supreme Court said, at 711:

> "There is much said in the briefs and in oral argument about this case as a test case. It is said that taxes on the sale of about 50,000 units turn on this decision. * * *"

On remandment, we are therefore immediately confronted with the question of whether plaintiffs have shown that the two cases now before the court with their small money content, are actually "prototype or test" cases so as to justify the extension of the effect of the result herein to other cases not before the court. The record does not show that taxes on the sale of the "about 50,000 units" have been paid. If they have *not* been paid, there is no basis for a suit for refund such as was brought in the cases at bar. Even if the taxes *were* paid in reliance upon the validity of the revenue rulings, the litigation now before the court fails utterly to show a similar right of recovery by taxpayers in the cases not before the court, because there is no showing that any consents have been obtained by said taxpayers as required by 26 U.S.C.A. § 6416 (a) (3), 1954 Code.

Neither by allegations of facts in the complaints or in the stipulations, nor by evidence introduced, did plaintiffs establish in the district court that, as a matter of fact or of law, the cases at bar are prototypes of the cases involved in the sale of about 50,000 units which are not before the court. Similarity has not been shown. It therefore becomes our duty to limit the effect of the judgment of the district court to the parties named in the judgment entered on June 11, 1958, in which Cory Corporation was plaintiff and Ernest J. Sauber, as former district director of internal revenue, Chicago, was defendant.

We find that, for the reasons hereinbefore set forth, findings 5, 6 and 7 of the district court, insofar as they find that the present action is a prototype or test case to determine whether plaintiffs' air conditioners are subject to excise tax, are clearly erroneous and we set aside said

findings in that respect. We hold that the said civil action brought by plaintiffs is not a prototype or test-case and is not to be given effect as such by the district court.

The stipulation of the parties to the effect that this is a prototype or test case is not sufficient to support the district court's conclusion. While the parties to a civil action, in which only they have an interest, generally may set up for court determination a prototype or test case, in such form as they see fit, public interest in the protection of the federal revenue is an overriding consideration which bars a blanket adjudication of a large total of tax refund claims, based upon test cases privately contrived especially for that purpose. Moreover, this "test" case, which is intended to serve as a release of 50,000 disbursements from the federal treasury, lacks the bona fide consents of buyers which the refund act, *supra*, requires.

In *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281, 289, the court said:

> "If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law. • • •"

Whether or not a large multitude of cases is to be controlled by the case at bar as a prototype or test case is hence a question of law as to which the stipulation of the parties is not binding upon the court. *In re Gubelman*, 10 F.2d 926, 929, 2 Cir. To the same effect is *Davis* v. *Commissioner of Internal Revenue*, 241 F.2d 701, 7 Cir.

This case involves the public revenue to an important extent. In such a case, the parties are not free to stipulate away the rights of the public. This principle is forcibly applied in *National Bank* v. *Murphy*, 384 Ill. 61, where the court said, at 64:

> "• • • No valid stipulation or agreement, as to questions of law or the legal effect of facts, can be

made by the parties. * * * Neither can they stipulate the legal effect of admitted facts. * * *" (Citing *Swift & Co.* v. *Hocking Valley Ry. Co., supra.*)

And, at 65:

"The decision of questions of law must rest upon the judgment of the court, uninfluenced by stipulations of the parties or their counsel. This is also true as to legal conclusions arising from the facts involved. * * *"

For these reasons, we determine that the judgment entered by the district court on June 11, 1958 for $29.93 and costs in favor of plaintiff, Cory Corporation, and against defendant, and ordering execution thereon, is to have no effect whatsoever upon other claims or cases, as an adjudication of a prototype or test case.

For the reasons hereinbefore stated, the aforesaid judgment of the district court is reversed.

JUDGMENT REVERSED.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1960—JANUARY SESSION, 1961

No. 12479

CORY CORPORATION and MITCHELL MANUFACTURING COMPANY,
Plaintiffs-Appellees,
v.
ERNEST J. SAUBER,
Defendant-Appellant.

On Appeal from the Judgment of the United States District Court for the Northern District of Illinois.

January 11, 1961

ON PETITION FOR REHEARING EN BANC

DUFFY, *Circuit Judge.* A majority of the members of this Court in active service has voted to deny the petition herein for a rehearing en banc. As I voted in favor of granting such petition, a brief statement of my reasons therefor would seem to be in order.

This Court, on its own motion, and without any request by either party, has invalidated the basic stipulation upon which this litigation has proceeded in three courts for more than three years. The Government has made no effort to repudiate the agreement which it made.

On June 3, 1957, the Government had asked for a continuance to which plaintiffs objected. After eleven days of negotiation with the Internal Revenue Service and the Department of Justice, the stipulation was entered into. No one has suggested the stipulation was unfair, inadequate or induced by misrepresentation or mistake. The Government does not claim that it has been over-reached. It seems to me that the stipulation is in the public interest. This was not a stipulation of law as indicated in

our opinion. It related only to "air conditioning units similar to those described in the above civil actions."

Rather than try the same issue of fact and law in numerous proceedings, the parties agreed to try the issue once and for all in the present case. There can be no public interest that demands repeated trials of the same issue. Stipulations designed to avoid repeated trials of the same issue should be held valid and binding.

In *United States* v. *Davison,* (W.D.Pa), 1 F. 2d 465, aff'd, 3 Cir., 9 F.2d 1022, cert. denied, 271 U.S. 670, as in the case at bar, the Government had stipulated that the decision in one tax case should control the decision in other tax cases involving the same factual situation. The court approved the stipulation stating, at page 470, "It was greatly to the interest of both parties to that action that a score of cases, involving the same questions of fact and law, should be disposed of by the trial and final adjudication of a single case. This both sides agreed to."

In my view, the decision of this Court is wrong in equating rated horsepower with nominal horsepower. We say "Whether or not such an individual is to bear a tax upon his purchase can readily be established by an inspection of the manufacturer's horsepower *rating* tag affixed thereto."

Nominal horsepower is not the same as rated horsepower. Nominal horsepower is assigned solely in the uncontrolled discretion of the various motor manufacturers. Actual horsepower and rated horsepower are standardized, measurable and easily ascertainable. Nominal horsepower is arbitrary and unstandardized.

The Supreme Court directed this Court to review the District Court's findings as to what horsepower meant "among engineers." Our Court has now disregarded engineering concepts and selects criteria derived from plates on compressor housings and tags.

Inasmuch as the decision of this Court in this case is based to a considerable degree upon questions neither argued nor briefed, I have concluded that the Court, sitting en banc, should consider the issues.

2. JUDGMENT BELOW.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois

Monday, November 21, 1960

Before:

Hon. John S. Hastings, Chief Judge.

Hon. F. Ryan Duffy, Circuit Judge.

Hon. Elmer J. Schnackenberg, Circuit Judge.

CORY CORPORATION and MITCHELL MANUFACTURING CO., Delaware Corp., *Plaintiffs-Appellees,* v. ERNEST J. SAUBER, *Defendant-Appellant.* No. 12479	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division subsequent to remandment to this Court by the Supreme Court of the United States for further proceedings in conformity with the opinion of said Court.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this day.

3. ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois

Friday, January 6, 1961

Before:

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Latham Castle, Circuit Judge

CORY CORPORATION and MITCHELL MANUFACTURING CO., *Plaintiffs-Appellees,* v. ERNEST J. SAUBER, *Defendant-Appellant.*	Appeal from the Judgment of the United States District Court for the Northern District of Illinois.

No. 12479

On consideration of the petition of plaintiffs-appellees for rehearing *en banc* filed in the above entitled cause on December 6, 1960; and

It appearing that a majority of the members of this court in active service have voted to deny such petition for rehearing *en banc*;

It Is Ordered by the court that the petition of plaintiffs-appellees for rehearing en banc in the above entitled cause be and the same is hereby denied.

DUFFY, *C.J.*, voted to grant the petition for rehearing *en banc.*

4. ORDER DENYING ARGUMENT.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Thursday, October 20, 1960.

Before:

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

CORY CORPORATION and MITCHELL MANUFACTURING CO.,
Plaintiffs-Appellees,
v.
ERNEST J. SAUBER,
Defendant-Appellant.

No. 12470

On remand from the United States Supreme Court.

The mandate of the United States Supreme Court having been filed herein on July 25, 1960, and counsel for defendant-appellant having filed herein on September 2, 1960, a motion for leave to file a supplemental memorandum upon remand and for oral argument, to which appellees have expressed no objection, and the court having considered the situation thus presented and being fully advised in the premises,

It Is Hereby Ordered that said motion be and the same is hereby denied and that this case, upon remandment, be taken on the briefs heretofore filed herein and without oral argument.

5. STATUTES.

INTERNAL REVENUE CODE OF 1939.

SEC. 3405. [As amended by Sec. 614 of the Revenue Act of 1942, c. 619, 56 Stat. 798; Sec. 606, Revenue Act of 1950, c. 994, 64 Stat. 906; Sec. 483, Revenue Act of 1951, c. 521, 65 Stat. 452, and Sec. 305(a), Excise Tax Reduction Act of 1954, c. 126, 68 Stat. 37.]. TAX ON MECHANICAL REFRIGERATORS, QUICK-FREEZE UNITS, AND SELF-CONTAINED AIR-CONDITIONING UNITS.

There shall be imposed on the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 5 per centum (10 per centum in the case of articles subject to tax under subsection (c)) of the price for which sold:

(a) *Refrigerators and Quick-Freeze Units.*—Household type refrigerators (for single or multiple cabinet installations) having, or being primarily designed for use with, a mechanical refrigerating unit operated by electricity, gas, kerosene, or gasoline; household type units for the quick freezing or frozen storage of foods, operated by electricity, gas, kerosene, or gasoline; combinations of such household type refrigerators and units.

(b) *Refrigerating and Freezing Apparatus.*—Cabinets, compressors, condensers, condensing units, evaporators, expansion units, absorbers, and controls (hereinafter referred to as "refrigerator components") for, or suitable for use as parts of or with, household type refrigerators or quick-freeze units of the kind described in subsection (a), except when sold as component parts of complete refrigerators, refrigerating or cooling apparatus, or quick-freeze units (hereinafter referred to as "refrigerating equipment"). Under regulations prescribed by the Secretary, the tax under this subsection shall not apply in the

case of sales of any such refrigerator components by the manufacturer, producer, or importer to (1) a manufacturer or producer of refrigerating equipment, or (2) a vendee for resale to a manufacturer or producer of refrigerating equipment if such components are in due course so resold. If any such refrigerator components are resold by the manufacturer or producer to whom sold or resold otherwise than on or in connection with, or with the sale of, complete refrigerating equipment manufactured or produced by him, then for the purposes of this section such manufacturer or producer shall be considered the manufacturer or producer of the refrigerator components so resold by him.

(c) *Air-Conditioners.*—Self-contained air-conditioning units.

(26 U. S. C. 1952 ed., Sec. 3405.)

Internal Revenue Code of 1954.

Subchapter B—Household Type Equipment, etc.

Part I—Refrigeration Equipment.

Sec.

4111. Imposition of tax.

4112. Definitions.

4113. Exemptions for manufacturers.

Sec. 4111. Impositions of Tax.

There is hereby imposed upon the sale of the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:

Articles Taxable at 5 Percent—

Household type refrigerators (for single or multiple cabinet installations) having, or being primarily designed for use with, a mechanical re-

frigerating unit operated by electricity, gas, kerosene, or gasoline.

Household type units for the quick freezing or frozen storage of foods operated by electricity, gas, kerosene, or gasoline.

Combinations of household type refrigerators and quick-freeze units described above.

Refrigerator components.

ARTICLES TAXABLE AT 10 PERCENT—

Self-contained air-conditioning units.

(26 U. S. C. 1952 ed., Supp. II, Sec. 4111.)

SEC. 6416. [As amended Aug. 11, 1955, c. 793, § 2, 69 Stat. 676; Aug. 11, 1955, c. 805 §§ 1 (h), (i), 2(b), 69 Stat. 690; Apr. 2, 1956, c. 160, § 2 (b) (1), 70 Stat. 90; June 29, 1956, c. 462, Title II, § 208 (b), 70 Stat. 393; June 30, 1958, Pub. L. 85—475, § 4 (b) (5), (6), 72 Stat. 260; Sept. 2, 1958, Pub. L. 85—859, Title I, § 163 (a), (c), 72 Stat. 1306, 1311; Sept. 21, 1959, Pub. L. 86—342, Title II, § 201 (d) (1), 73 Stat. 614; Apr. 8, 1960, Pub. L. 86—418, § 3, 74 Stat. 38; Sept. 14, 1960, Pub. L. 86—781, § 2, 74 Stat. 1018.] Certain taxes on sales and services.

(a) *Condition to allowance.*—

(1) *General rule.*—No credit or refund of any overpayment of tax imposed by section 4231 (4), (5), or (6) (cabarets, etc.), chapter 31 (retailers taxes), or chapter 32 (manufacturers taxes) shall be allowed or made unless the person who paid the tax establishes, under regulations prescribed by the Secretary or his delegate, that he—

(A) has not included the tax in the price of the article, admission, or service with respect to which it was imposed and has not collected the amount of the tax from the person who purchased such article, admission, or service;

(B) has repaid the amount of the tax—

(i) in the case of any tax imposed by chapter 31 (other than the tax imposed by section 4041

(a) (1) or (b) (1)), to the purchaser of the article,

(ii) in the case of any tax imposed by chapter 32 and the tax imposed by section 4041 (a) (1) or (b) (1) (diesel and special motor fuels), to the ultimate purchaser of the article, or

(iii) in the case of any tax imposed by section 4231 (4), (5), or (6) (cabarets, etc.) to the person who paid for the admission, refreshment, service, or merchandise;

(C) in the case of an overpayment under subsection (b) (2), (b) (3) (C) or (D), or (b) (4) of this section—

(i) has repaid or agreed to repay the amount of the tax to the ultimate vendor of the article, or

(ii) has obtained the written consent of such ultimate vendor to the allowance of the credit or the making of the refund; or

(D) has filed with the Secretary or his delegate the written consent of the person referred to in subparagraph (b) (i), (ii), or (iii), as the case may be, to the allowance of the credit or the making of the refund.

(26 U. S. C. 1952 ed., Supp. II, Sec. 6416 (a))

6. REVENUE RULINGS.

S. T. 934, 1948-2 C. B. 180.

Advice is requested concerning the type of self-contained air-conditioning units subject to tax under section 3405(c) of the Internal Revenue Code, as amended.

Section 3405 (c) of the Code, as amended, imposes a tax of 10 per centum on sales by the manufacturer, producer, or importer of self-contained air-conditioning units.

It is held that the type of self-contained air-conditioning unit subject to tax under section 3405 (c) of the Code, as amended, is a factory-made encased assembly primarily designed for free delivery of air and for installation in a window or in front of a window which (1) contains means for moving outside air through its condenser, (2) includes means for cooling, dehumidifying, and circulating the air of a room, and (3) has a total motor horsepower of less than 1 horsepower or a total cooling capacity of less than 10,000 B.T.U.'s per hour at standard American Society of Refrigerating Engineers test conditions as set forth in ASRE Circular No. 16, dated June, 1940.

REV. RUL. 54-462, 1954-2 C. B. 410.

Advice is requested concerning the types of self-contained air-conditioning units which are subject to tax under section 3405 (c) of the Internal Revenue Code of 1939.

Section 3405 (c) of the Code imposes a tax of ten per centum on sales by the manufacturer, producer, or importer of self-contained air-conditioning units.

It is held that the type of self-contained air-conditioning unit subject to tax under section 3405 (c) of the Code includes a unit, whether a factory made encased assembly or one sold for assembly on installation, primarily designed for free delivery of air and for installation in or in front

of a window or other opening which (1) contains means for moving outside air through its condenser, (2) incorporates means for cooling, dehumidifying, and circulating the air of a room or other enclosure, and (3) has a total motor horsepower of less than 1 horsepower for motor-driven compressor types, or in the case of absorption types, a total cooling capacity of less than 10,000 B.T.U. per hour at standard American Society of Refrigerating Engineers test conditions as set forth in ASRE Circular No. 16 dated June 1940.

S.T. 934, C. B. 1948-2, 180 is hereby superseded.